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No. ..-...

IN THE

Supreme Court of the United States

October Term, 1982

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Appellant,

vs.

CONSTRUCTION LABORERS VACATION TRUST FOR SOUTHERN CALIFORNIA, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

OR IN THE ALTERNATIVE

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

JURISDICTIONAL STATEMENT.

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Questions Presented.

1. Did the United States District Court have subject matter jurisdiction over the Franchise Tax Board's Complaint for Failure to Honor Garnishment and for Declaratory Relief which was originally filed in state court and removed by Appellee to federal court where the Franchise Tax Board's causes of action were based solely on State law and any federal question was raised only as a defense?

2. Is California prohibited by the doctrine of preemption from collecting delinquent personal income taxes from a vacation trust regulated by the Employment Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* (commonly known as ERISA), notwithstanding the fact that

   a. The California statute which authorizes said collection (Calif. Revenue & Taxation Code § 18817) neither conflicts with any specific provision of ERISA nor interferes with the Congressionally stated purpose of ERISA;

   b. Congress did not specifically indicate that ERISA was intended to prempt State levy statutes such as the California statute?

3. If the provisions of ERISA were intended to preempt State levy statutes such as the California statute, is this unconstitutional as a violation of the Tenth Amendment because it interferes with the sovereign power of the State of California to assess and uniformly collect its taxes?

Parties to This Action.

The parties to this action are:

1. The Franchise Tax Board of the State of California.
2. The Construction Laborers Vacation Trust for Southern California.
3. Edward Ashton.
4. Al Atwood.
5. Gary Bronneck.
6. John R. Clarke.
7. R.C. Gallyon
8. Richard Greenberg.
9. Foger Jaska.
10. William Middleton.
11. George Mattocks.
12. William R. McClain.
13. Nick Orsura.
14. Joe Rivera.
15. Ray M. Wilson.
16. James Keyes.

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FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Appellant,

vs.

CONSTRUCTION LABORERS VACATION TRUST FOR SOUTHERN CALIFORNIA, *et al.*,
Appellees.

JURISDICTIONAL STATEMENT.

Appellant the Franchise Tax Board of the State of California appeals from the Opinion of the United States Court of Appeals for the Ninth Circuit entered June 22, 1982, or in the alternative respectfully prays that a Writ of Certiorari issue to review that Opinion, which holds that California Revenue and Taxation Code section 18817 is preempted by the Employment Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001, *et seq.* (hereinafter ERISA) insofar as Revenue and Taxation Code section 18817 allows the Franchise Tax Board to levy on an employee welfare benefit plan (in this case a vacation trust) regulated by ERISA to collect a beneficiary's delinquent taxes.

Appellant the Franchise Tax Board submits this statement to demonstrate that the Supreme Court of the United States has jurisdiction of this appeal, that the United States District Court did not have subject matter jurisdiction of this action, and that substantial questions are presented.

Opinions Below.

The Opinion of the Court of Appeals (Appendix A, *infra*) was filed on June 22, 1982 and is reported at 679 F.2d 1307; that Court's Order denying Appellant's Petition For Rehearing (Appendix D, *infra*) was filed on July 21, 1982. The Judgment of the United States District Court for the Central District of California (Appendix B, *infra*) was entered on December 4, 1980. The Findings of Fact and Conclusions of Law for the United States District Court for the Central District of California (Appendix C, *infra*) were entered on December 4, 1980.

Jurisdiction.

This suit was originally brought in the Superior Court of the State of California for the County of Los Angeles by the Appellant, the Franchise Tax Board of the State of California.

Appellees, the Trustees of the Construction Laborers Vacation Trust Fund For Southern California, filed a Petition For Removal which alleged that the federal court had original jurisdiction over this proceeding pursuant to sections 403(c)(1) and 514 of ERISA (29 U.S.C. §§ 1103, 1104, 1144.) Appellees alleged that the action was properly removed to federal court pursuant to 28 U.S.C. § 1441. The case was removed to federal court. The Franchise Tax Board filed a Motion To Remand pursuant to 28 U.S.C. § 1447(c) on the grounds that the United States District Court for the Central District of California did not have jurisdiction of the subject matter of the action because the suit did not involve a claim or right arising under the Constitution, treaties or laws of the United States and on the grounds that there was no other basis for the court's jurisdiction since the Franchise Tax Board's cause of action arose solely under California law as construed and applied by the courts of the State of California.

The United States District Court for the Central District of California denied the Motion To Remand.

The Opinion of the Court of Appeals for the Ninth Circuit was filed on June 22, 1982. A timely Petition For Rehearing was filed on July 6, 1982. The Petition For Rehearing was denied on July 21, 1982.

Appellant filed a Notice of Appeal to the Supreme Court of the United States from the Opinion on September 17, 1982, with the clerk, United States Court of Appeals for the Ninth Circuit. (Appendix F, *infra*.)

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(2).

Such a direct appeal is allowed where a Court of Appeals holds a State statute to be invalid as repugnant to the Constitution, treaties or laws of the United States. Herein the Court of Appeals for the Ninth Circuit held that California Revenue and Taxation Code section 18817 was preempted by ERISA insofar as it allowed the Franchise Tax Board to levy on ERISA — regulated vacation trusts.

This Jurisdictional Statement is filed timely with this Court under the provisions of 28 U.S.C. § 2101(c).

Constitutional Provisions and Statutes Involved.

California Revenue and Taxation Code section 18817 provides in pertinent part:

> "The Franchise Tax Board may . . . require any employer, person, . . . having in their possession, or under their control, any credits or other personal property or other things of value, belonging to a taxpayer . . . to withhold, from such credits or other personal property or other things of value, the amount of any tax, interest, or penalties due from the taxpayer . . . and to transmit the amount withheld to the Franchise Tax Board at such times as it may designate."

ERISA section 3, 29 U.S.C. § 1002 provides in pertinent part:

". . . For purposes of this title:

"(1) The terms 'employee welfare benefit plan' and 'welfare plan' mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or *vacation* benefits, . . . (Emphasis added.)

"(2) The terms 'employee pension benefit plan' and 'pension plan' mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund or program —

"(A) provides retirement income to employees,

". . . .

"(3) The term 'employee benefit plan' or 'plan' means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan."

Thus, a vacation trust is defined as an "employee benefit plan," an "employee welfare benefit plan" or a "welfare plan" but not as a "pension plan."

ERISA section 206(d)(1), 29 U.S.C. § 1056(d)(1) provides as follows: "Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated."

ERISA section 514(a), 29 U.S.C. § 1144(a) provides in pertinent part:

> "Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b)."

ERISA section 514(c)(2), 29 U.S.C. § 1144(c)(2) provides in pertinent part:

> "The term 'State' includes a State . . . which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title."

Statement of the Case.

Appellees, the Trustees of the Construction Laborers Vacation Trust, hold vacation trust fund benefits on behalf of certain beneficiaries who are employed in the construction industry. These vacation trust fund benefits are governed by the provisions of ERISA. Appellant, the Franchise Tax Board, served Notices to Withhold Personal Income Taxes pursuant to California Revenue and Taxation Code sections 18817 and 18818 on the Trustees in order to collect the unpaid personal income tax liabilities of these certain beneficiaries from the vacation trust fund benefits held by the Trustees for those beneficiaries.[1] The Trustees refused to honor said Notices to Withhold on the grounds that Revenue and Taxation Code section 18817 was preempted by ERISA, specifically ERISA section 514, 29 U.S.C. § 1144.

Appellant, Franchise Tax Board, filed an action on June 13, 1980 for failure to honor garnishment and for declaratory relief in the Superior Court of the State of California for the County of Los Angeles.

Appellees removed the case to the United States District Court for the Central District of California on June 26, 1980.

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[1]The sole issue in this case concerns ERISA-regulated vacation benefits. The Board has not levied on pension benefits.

On July 8, 1980, appellees filed a Motion to Dismiss on the ground that the Franchise Tax Board failed to state a claim upon which relief could be granted in that Revenue and Taxation Code section 18817 as the Franchise Tax Board sought to apply it in this case was preempted by ERISA, specifically ERISA section 514, 29 U.S.C. § 1144.

On July 22, 1982, the Franchise Tax Board filed its opposition to the motion to dismiss. The parties agreed that the motion to dismiss and opposition thereto could be treated as cross motions for summary judgment.

The United States District Court made its order granting summary judgment for the Franchise Tax Board. On December 4, 1980, Findings of Fact and Conclusions of Law (Appendix C, *infra*) and Judgment (Appendix B, *infra*) were entered.

On December 16, 1980, the Construction Laborers Vacation Trust Fund, *et al.*, filed its Notice of Appeal to the Court of Appeals for the Ninth Circuit.

The case was argued before a panel of the United States Court of Appeals for the Ninth Circuit on February 2, 1982. On June 22, 1982, the panel issued an opinion (one judge dissenting) reversing the United States District Court's granting of summary judgment for the Franchise Tax Board.

A Petition for Rehearing was timely filed. The panel issued an order on July 21, 1982 denying the Petition for Rehearing.

The Court of Appeals for the Ninth Circuit found that although vacation trusts are not specifically protected from creditors' claims under ERISA section 206(d)(1), 29 U.S.C. § 1056(d)(1) as are pension trusts, they are impliedly covered, and further that Revenue and Taxation Code section 18817 is preempted by ERISA section 514(a), 29 U.S.C. § 1144(a) as a State law relating to an employee benefit plan insofar as it is used to levy against a vacation trust to satisfy a beneficiary's delinquent taxes.

The opinion of the Ninth Circuit erroneously allows certain individuals to insulate their yearly vacation pay from California tax levy.

The Court of Appeals relied for its opinion on the case of *Alessi v. Raybestos-Manhatten, Inc.* (1981) 451 U.S. 504 decided by this Court. The Franchise Tax Board respectfully submits that this Court should clarify the *Alessi* opinion by stating that the opinion does not prohibit a State from levying on ERISA vacation trust funds in order to collect taxes.

The Franchise Tax Board also submits that this Court should clarify the scope of ERISA's anti-alienation and preemption sections and find that Congress did not intend to treat vacation benefits the same as pension benefits and did not intend to interfere with the historic police power of the States to collect delinquent taxes.

In addition, the Franchise Tax Board submits there is a serious question regarding whether the United States District Court had subject matter jurisdiction of this action since the Franchise Tax Board's causes of action were based solely on State law and any federal questions were raised only as a defense.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL.

I.
INTRODUCTORY STATEMENT.

The Ninth Circuit has held that California's income tax levy statute, Revenue and Taxation Code section 18817, has been preempted and thus California is prohibited from levying on ERISA-covered *vacation* trust benefits to collect delinquent taxes.

The Ninth Circuit opinion is clearly erroneous because Congress clearly did not intend for workers covered under ERISA vacation plans to finance their annual vacation before they pay their taxes.

This is the first time insofar as the Franchise Tax Board is aware, that any court has prohibited a levy or garnishment on an ERISA-regulated vacation trust. Before this case, the only other reported case regarding vacation trusts was from the Supreme Court of Missouri. In *Electrical Workers v. IBEW-NECA Holiday Trust* (1979) 583 S.W.2d 154, the Missouri Supreme Court allowed a credit union to garnish a vacation trust. This decision of the Ninth Circuit conflicts with the *Electrical Workers* decision and is erroneous because Congress has not specifically prohibited this levy, the levy would not interfere with the stated goals of Congress in creating ERISA, the California levy statute does not directly or indirectly regulate the ERISA-covered vacation trusts, and the decision interferes with the historic sovereign power of the State of California to assess and collect taxes.

At the outset, it must be emphasized that this case concerns vacation benefits only. The Franchise Tax Board has not attempted to levy on pension benefits. This is an important distinction because when Congress created ERISA, it was primarily for the purpose of protecting pension trusts from mismanagement and various abuses of the past. Congress realized the importance of assuring that American workers could rely on their pension when they retired. The

Franchise Tax Board submits that vacation pay is not in the same category as a lifetime pension and that Congress did not intend vacation pay to receive the same protection as a pension plan.[2] This is easily demonstrated by an analysis of ERISA itself which indicates that all sections of ERISA apply to pension trusts while only some apply to vacation trusts.

The Congressional findings and declaration of policy with regard to ERISA are found at ERISA section 2, 29 U.S.C. § 1001. An analysis of these findings shows that the Franchise Tax Board's levy on vacation benefits will not interfere with these stated purposes of ERISA.

The Congressional findings indicate that Congress was concerned with the financial security of participants and their beneficiaries and in order to insure this security, Congress legislated strict controls with respect to the establishment, operation and administration of ERISA plans. The Congressional findings specifically refer to retirement benefits and the need for vesting provisions. The findings do not refer specifically to vacation benefits.

This Court has stated that ERISA is a comprehensive statute "which Congress adopted after careful study of private retirement plans." *Alessi v. Raybestos-Manhatten, Inc.* (1981) 451 U.S. at 510.

The issue is a substantial one which affects all States throughout the nation in their collection of taxes where a vacation trust governed by ERISA is involved. The Franchise Tax Board submits that this Court should note probable jurisdiction and allow full briefing and oral argument in order to settle this important question.

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[2]The dissenting judge in the Ninth Circuit opinion below stated that "In real world terms, the loss of one's pension is far more catastrophic than the loss of funds devoted to financing an annual vacation." *Franchise Tax Bd. Etc. v. Construction Laborers, Etc.* (9th Cir. 1982) 679 F.2d 1307, 1311.

In California alone, the Franchise Tax Board estimates that there are over 400,000 individuals working in various industries who are beneficiaries of vacation trusts. This Ninth Circuit opinion will preclude the State of California from levying on these vacation trusts to collect delinquent taxes.

With regard to the construction industry, the Franchise Tax Board is often unable to levy on the wages of construction workers because the workers are employed by multiple employers for various periods of time. In many cases, the vacation trust is the most feasible tax collection device available to the Franchise Tax Board.

The Ninth Circuit has relied on the general preemption section, ERISA section 514(a), 29 U.S.C. § 1144(a), and the recent case of *Alessi v. Raybestos-Manhatten, Inc., supra,* 451 U.S. 504, for its decision.

The Ninth Circuit also found that although vacation trusts were not specifically protected from creditor's claims, ERISA's purpose and the anti-alienation clause in ERISA section 206(d)(1), 29 U.S.C. § 1056(d)(1) impliedly prohibited the Franchise Tax Board from levying on the vacation trust.

The Board seeks guidance from this Court as to the scope of ERISA's preemptive and anti-alienation sections especially concerning the sovereign police power of the State of California to levy on vacation trust funds to collect delinquent taxes.

The Board also seeks guidance as to whether the *Alessi* case which dealt with a state law that directly regulated a *pension* trust should be interpreted to preclude the Franchise Tax Board from levying on *vacation* trust funds.

The Ninth Circuit has extended *Alessi* in two important respects in the case at bar. First, this case deals with a vacation trust, not a pension trust as did *Alessi*. Second, this case deals with a State statute, Revenue and Taxation Code section 18817, which does not directly or indirectly

regulate an ERISA-covered vacation trust, contrary to the statute discussed in *Alessi*.

In *Alessi*, this Court noted that it was not deciding the outer limits of ERISA's preemption section. The Franchise Tax Board respectfully contends that this Court should now decide that the preemption section of ERISA is not limitless and that Congress did not intend to nor did it have the power to interfere with the sovereign police power of a State to assess and uniformly collect its taxes.

The Franchise Tax Board contends there is no direct conflict with ERISA section 206(d)(1), 29 U.S.C. § 1056(d)(1), because that section does not specifically prohibit the Franchise Tax Board from levying on vacation trusts. Furthermore, prohibition should not be implied which would infringe on the sovereign power of the State of California.

The Franchise Tax Board further contends that ERISA's preemption section, ERISA section 514(a), 29 U.S.C. § 1144(a) does not preempt Revenue and Taxation Code section 18817.

First, Revenue and Taxation Code section 18817 does not purport to regulate, directly or indirectly, the terms and conditions of the ERISA-covered vacation trusts.

Second, Congress has not totally occupied the field of vacation trusts. Although all of the provisions of ERISA apply to pension plans, by contrast, employee welfare benefit plans (vacation trusts) are only covered by the sections dealing with reporting, disclosure, fiduciary standards and administration. This indicates that Congress intended to regulate more fully in the area of pension trusts and did not intend to preempt all state laws that peripherally or tangentially concern vacation trusts.

Many Courts of Appeal and District Courts have found an exception in the ERISA preemption section within the context of spousal and child support. These courts have allowed ex-spouses and children of ERISA beneficiaries to levy on ERISA covered *pension* trusts.

The Franchise Tax Board contends that if this exception with regard to pension trusts can be made in the area of domestic relations, then it is clear that the State of California must be allowed to levy against a *vacation* fund.

II.

THE UNITED STATES DISTRICT COURT DID NOT HAVE SUBJECT MATTER JURISDICTION OF THIS ACTION.

It must be noted at the outset that the United States District Court never had jurisdiction of this suit and the court should have remanded this suit to the State courts.

The Franchise Tax Board's causes of action originally filed in State court were based solely on State law. Federal law (ERISA) was raised merely as a defense to the causes of action.

It is clear that federal jurisdiction must be established solely by the complaint. (*Skelly Oil Co. v. Phillips Petroleum* (1950) 339 U.S. 667, 673-67; *Gully v. First National Bank* (1936) 229 U.S. 109, 113; *Tennessee v. Union & Planters' Bank* (1894) 152 U.S. 454, 459.)

The federal claim must not be asserted by way of defense. (*Gully v. First National Bank, supra*, 299 U.S. at 113.)

This Court has repeatedly and clearly held that in order for a claim to arise "under the Constitution, laws, or treaties of the United States," a right or immunity created by the Constitution or laws of the United States must be an essential element of the plaintiff's cause of action. (*Phillips Petroleum Co. v. Texaco Co.* (1974) 415 U.S. 125, 126; *Gully v. First Nat. Bank, supra*, 299 U.S. at 112.)

This Court has also pointed out that the federal question must be disclosed upon the face of the complaint, unaided by the answer and the complaint itself will not serve as a basis of jurisdiction insofar as it goes beyond a statement of the plaintiff's cause of action and anticipates or replies to a probable defense. (*Phillips Petroleum Co. v. Texaco*

Co., supra, 415 U.S. at 127-128; *Gully v. First Nat. Bank, supra*, 299 U.S. at 113.)

The *Gully* case concerned an action by the State Collector of Taxes against a national bank as agent for its shareholders. This Court took the case to consider the jurisdiction of the District Court and decided that the District Court did not have jurisdiction. This Court said:

> "Not every question of federal law emerging in a suit is proof that a federal law is the basis of the suit. The tax here in controversy if valid as a tax at all, was imposed under the authority of a statute of Mississippi. The federal law did not attempt to impose it or to confer upon the tax collector authority to sue for it." (*Gully, supra*, 299 U.S. at 115.)

This is directly analogous to the case at bar in that California imposed the income tax under State law and was attempting to collect it solely under State law. By raising the question of ERISA and preemption as a defense, appellees could not give the United States District Court jurisdiction.

III.
THE ALESSI CASE SHOULD BE CLARIFIED.

In *Alessi*, this Court found that a New Jersey statute was preempted by ERISA section 514(a), 29 U.S.C. § 1144(a), because it eliminated one method for calculating ERISA *pension* benefits that was permitted by federal law. This Court found that the New Jersey law applied *directly* to the calculation of the ERISA pension benefits. (*Alessi, supra*, 451 U.S. at 524-525;

The Ninth Circuit relied on the *Alessi* case to find that California's levying statute was preempted insofar as it permitted the Franchise Tax Board to levy against an ERISA regulated *vacation* trust to satisfy a beneficiary's delinquent taxes.

The Franchise Tax Board contends that the *Alessi* case has no application to the case at bar because *Alessi* concerned *pension* trusts while the case at bar concerns *vacation* trusts.

In addition, the New Jersey statute obviously was a direct regulation of ERISA pension plans because it mandated how they must not be calculated. The California statute, by contrast, does not even mention ERISA plans and in no way attempts to regulate ERISA-covered benefits.

In the *Alessi* case, this Court noted that it was only deciding the case before it and was not deciding the question of how broadly ERISA's preemption section should be applied. This Court said:

> "We need not determine the outer bounds of ERISA's pre-emptive language to find this New Jersey provision an impermissible intrusion on the federal regulatory scheme." (*Alessi, supra,* 451 U.S. at 525.)

In *Alessi*, this Court stated in a footnote that "Other courts have reached varying conclusions as to the meaning of ERISA's pre-emptive language in other contexts. . . . We express no views on the merits of any of those decisions." (*Alessi, supra,* 451 U.S. at 525 n. 21.)

As examples of the "other contexts," this Court referred to the cases of *American Tel. and Tel. Co. v. Merry* (2d Cir. 1979) 592 F.2d 118; *Stone v. Stone* (N.D. Cal. 1978) 450 F.Supp. 919, aff'd (9th Cir. 1980) 632 F.2d 740, cert. denied (1981) 453 U.S. 922 and *Gast v. Oregon* (1978) 585 P.2d 12, 36 Or. App. 441.

The *American Tel. and Tel.* and *Stone v. Stone* cases allowed wives to levy on the *pension* benefits of their former husbands. The Second Circuit in *American Tel. and Tel.* found that Congress did not mean to preempt state laws that touch upon ERISA plans only in the most remote and peripheral way. (*American Tel. and Tel., supra,* 592 F.2d at 121.)

In *Stone v. Stone*, the District Court found that ERISA section 514(a) was not designed to preempt any state law with even the most tangential relation to ERISA. 450 F.Supp. at 932.

In *Gast v. Oregon, supra*, 585 P.2d 12, the court found that ERISA did not preempt a state law which regulated the substantive nature of health and welfare benefits. The court basically found that ERISA does not fully regulate health and welfare benefits as opposed to pension benefits.

The Franchise Tax Board submits that this Court should approve the *American Tel. and Tel.*, *Stone* and *Gast* cases and thus give the lower courts guidance as to the limits of the *Alessi* holding. The Franchise Tax Board submits that this Court should further explain that the Ninth Circuit has impermissibly extended *Alessi* to areas not envisioned nor intended by this Court.

IV.

CALIFORNIA'S LEVYING STATUTE DOES NOT DIRECTLY CONFLICT WITH ANY PROVISION OF ERISA AND IT IS NOT PREEMPTED BY ERISA SECTION 514(a).

The Ninth Circuit found that California's levying statute conflicts with ERISA section 206(d)(1), 29 U.S.C. § 1056(d)(1) which it found impliedly prevents levies against ERISA-covered vacation trust funds and that California's levy statute is also preempted by ERISA section 514(a), 29 U.S.C. § 1144(a) as a State law relating to an employee benefit plan.

A. There Is No Direct Conflict.

The majority opinion of the Ninth Circuit below admits that "ERISA does not in so many words protect vacation trusts from creditors' claims." (*Franchise Tax Bd., Etc., v. Construction Laborers, Etc.* (9th Cir. 1982) 679 F.2d 1307, 1309.)

However, it relies on ERISA's only anti-alienation clause, ERISA section 206(d)(1), 29 U.S.C. § 1056(d)(1),

which applies solely to *pensions*, to find an implied prohibition in ERISA against levying upon a *vacation* trust.

This implied preemption is contrary to the teaching of this Court which has held that where Congress has legislated in a field which the States have traditionally occupied, the historic police powers of the States will not be superseded by the federal legislation unless that was the "clear and manifest purpose of Congress." (*Rice v. Santa Fe Elevator Corp.* (1946) 331 U.S. 218, 230.)

The only specific non-alienation language to be found in ERISA refers only to pension plans and does not refer to employee welfare benefit plans (vacation trusts).

ERISA section 206(d)(1), 29 U.S.C. § 1056(d)(1) states "Each *pension* plan shall provide that benefits provided under the plan may not be assigned or alienated." (Emphasis added.)

ERISA section 201, 29 U.S.C. § 1051 which defines the coverage of Part 2, Participation and Vesting, *excludes* employee welfare benefit plans (vacation trusts) from its coverage. ERISA section 206(d)(1), 29 U.S.C. § 1056(d)(1) is a part of Part 2, *Participation & Vesting*. Therefore, by the terms of ERISA section 201(1), 29 U.S.C. § 1051 and by the terms of ERISA section 206(d)(1), 29 U.S.C. § 1056(d)(1) itself, the non-alienation language applies *only* to pension plans. If Congress had intended to impose non-alienation conditions on employee welfare benefit plans (vacation trusts), it would have done so clearly and unambiguously. Congress has been silent regarding the alienation of the vacation benefits involved in this lawsuit. Therefore, the California statutes which allow the Board to levy on vacation benefits do not conflict with ERISA and a conflict should not be implied.

As this Court stated in *F.T.G. v. Simplicity Pattern Co.* (1958) 360 U.S. 55, 67, "We cannot supply what Congress has studiously omitted."

If Congress had intended to insulate vacation trusts from tax levies, it would have specifically so provided.

For example, in the Railroad Retirement Act of 1974, Congress has explicitly stated that Railroad Retirement annuities are not subject to any tax. The Railroad Retirement Act of 1974 provides that "no annuity . . . shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated. . . ." 45 U.S.C. § 231m.

In *Hisquierdo v. Hisquierdo* (1979) 439 U.S. 572, this Court held that Railroad Retirement benefits are not subject to California's community property laws. As a part of its analysis of the Railroad Retirement Act, this Court pointed out that:

> "Even state collection laws must bow to its [the Railroad Retirement Act] command, for Congress added that phrase in an amendment designed in part to ensure that neither federal nor state tax collectors would encroach on the distribution of benefits." (*Hisquierdo v. Hisquierdo, supra,* 439 U.S. at 584.)

The Railroad Retirement Act's specific prohibition against a tax levy must be compared with ERISA section 206(d)(1), 29 U.S.C. § 1056(d)(1) which refers to pension plans only and does not mention tax laws. The Railroad Retirement Act and ERISA section 206(d)(1), 29 U.S.C. § 1056(d)(1) must both be contrasted to the area of employee welfare benefit plans (vacation trusts) where Congress has not prohibited tax levies or any other levies.

It must also be noted that with respect to Social Security benefits, Congress has specifically said they could not be alienated or assigned and that they were not subject to "execution, levy, attachment, garnishment . . ." 42 U.S.C. § 407, and with respect to Veteran's benefits, Congress has said such payments "shall not be liable to attachment, levy, or seizure . . ." 38 U.S.C. 3101(a).

B. California's Levying Statute Is Not Preempted by ERISA Section 514(a).

The majority of the Ninth Circuit panel below found that California's levying statute was preempted by ERISA section 514(a), 29 U.S.C. § 1144(a).

The Board contends that Congress did not intend to totally occupy the field of vacation trusts because large sections of ERISA have no application to vacation trusts. Furthermore, the California statute will not obstruct the objectives of Congress regarding ERISA.

A review of ERISA indicates that Congress did not regulate as thoroughly with regard to employee welfare benefit plans (vacation trusts), as it did with regard to pension plans. Both the statement of legislative intent contained in ERISA section 2,, 29 U.S.C. § 1001 and the various portions of ERISA indicate that Congress meant to confine federal regulation of employee welfare benefit plans (vacation trusts) to establishing minimum standards for reporting and disclosure and fiduciary responsibility. The regulation of pension trusts is much more pervasive. Specifically, there are sections of ERISA which apply to *pension* trusts only and do not apply to vacation trusts.

For example, Part One of ERISA deals with reporting and disclosure requirements for *both* pension and welfare benefit plans. ERISA section 101, *et seq.*, 29 U.S.C. § 1021, *et seq.*

Parts Two and Three are entitled Participation and Vesting and Funding and establish vesting and funding requirements. ERISA section 201, *et seq.*, 29 U.S.C. § 1051, *et seq.*, and ERISA section 301, *et seq.*, 29 U.S.C. § 1081, *et seq.* These parts apply only to pension benefit plans and not to welfare benefit plans (vacation trusts). ERISA section 201(1), 29 U.S.C. § 1051(1), ERISA section 301(a)(1), 29 U.S.C. § 1081(a)(1).

Part Four is entitled Fiduciary Responsibility and applies to both pension and welfare benefit plans. ERISA section 401, *et seq.*, 29 U.S.C. § 1101, *et seq.*

Part Five is entitled Administration and Enforcement and deals with *both* pension and welfare benefit plans, ERISA section 501, *et seq.*, 29 U.S.C. § 1131, *et seq.*

It is clear that if Congress has intended to totally preempt the field of vacation trusts then *all* not *some* of the ERISA sections would be applicable to vacation trusts.

C. California's Statute Does Not Regulate ERISA-Covered Vacation Trusts.

ERISA section 514(a), 29 U.S.C. § 1144(a) provides that "State" laws relating to employee benefit plans are superseded. The term "State" is defined to mean ". . . a State . . . which purports to *regulate*, directly or indirectly, the terms and conditions of employee benefit plans. . . ." (Emphasis added.) ERISA section 514(c)(2), 29 U.S.C. § 1144(c)(2).

When Congress provided for the general preemption section of ERISA, it was concerned with conflicting or inconsistent state and local regulation of employee benefit plans. ERISA was not intended to preempt all state law on all subjects that might have some peripheral, non-regulatory connection with employee benefit plans. (See *General Motors Corp. v. Townsend* (E.D. Mich. 1976) 468 F.Supp. 466.)

A review of the provisions of ERISA itself will indicate the areas where Congress intended to regulate.

Title 1 of ERISA is entitled "Protection of Employee Benefit Rights." The five sub-parts of Title 1 are as follows:

Part 1 — Reporting and Disclosure

Part 2 — Participation and Vesting

Part 3 — Funding

Part 4 — Fiduciary Responsibility

Part 5 — Administration and Enforcement

Title II concerns amendments to the Internal Revenue Code; Title III concerns Jurisdiction, Administration, Enforcement; Joint Pension Task Force, Etc., and Title IV concerns Plan Termination Insurance.

Congress meant to *regulate* ERISA plans in order to correct the past problems that workers had experienced with their benefit plans. This is why Congress carefully legislated in the areas of reporting and disclosure, participation and vesting, funding, fiduciary responsibility and administration and enforcement.

Revenue and Taxation Code section 18817 does not regulate ERISA plans in any way and specifically not in the areas of reporting and disclosure, participation and vesting, funding, etc. For example, Revenue and Taxation Code section 18817 obviously does not concern the vesting of a benefit plan or the fiduciary obligations of the Trustees.

The Board contends that the subjects covered by Titles I through IV are those which Congress intended to regulate. The Board further contends that Revenue and Taxation Code section 18817 is not meant to and *does not regulate* ERISA plans in any way and specifically not with regard to the areas covered by Congress.

V.

OTHER COURTS HAVE ALLOWED CREDITORS TO LEVY ON VACATION AND PENSION BENEFITS.

Prior to the case at bar, the only reported case which dealt directly with the issue of whether a creditor could levy on an ERISA-covered employee welfare benefit plan (vacation trust) was *Electrical Workers v. IBEW-NECA Holiday Trust* (1979) 583 S.W.2d 154. The opinion below did not mention this case.

At issue in the *Electrical Workers* case was whether a credit union could garnish the Holiday Trust Fund pursuant to a judgment it had obtained against an IBEW member.

The court *allowed* the credit union to garnish the *Holiday Trust Fund*. The court stated that creditors could not garnish a *pension* benefit plan because of ERISA's anti-assignment clause, ERISA section 206(d)(1), 29 U.S.C. § 1056(d)(1), but that the anti-assignment clause applied *only to pension plans*. The Supreme Court of Missouri found that the Missouri state law was not preempted because of a conflict with ERISA section 206(d)(1), 29 U.S.C. § 1056(d)(1), because the Holiday Trust was not a pension benefit plan. The Court then had to consider whether ERISA section 514(a), 29 U.S.C. § 1144(a) would preempt Missouri's state law.

Citing the test set forth in *Stone v. Stone* (N.D. Cal. 1978) 450 F.Supp. 919, 932, aff'd., (9th Cir. 1980) 632 F.2d 740, cert. denied, (1981) 453 U.S. 922, the Court stated, "The question we must answer is whether the Missouri state laws and policies we might wish to apply 'fall into [the] narrow category of laws which affect employee benefit plans but which do not relate to them within the meaning of § 1144(a).' " (*Electrical Workers, supra*, 583 S.W.2d at 158.)

The court then discussed the cases which have broadly construed ERISA section 514(a), 29 U.S.C. § 1144(a) and contrary cases such as *Stone v. Stone, supra*, which "have been reluctant to invalidate so much state legislation when the intent of Congress is not unmistakenly clear." (*Electrical Workers, supra*, 583 S.W.2d at 159.) The Court relied on the reasoning in the case of *Gast v. Oregon, supra*, 585 P.2d 12 and found no indication that Congress meant "to pre-empt areas of state regulation not addressed by ERISA or to leave such areas totally unregulated . . ." *Ibid.* The court concluded, "[T]he enforcement of state court money judgments by creditors is a valid area of state concern, and is one which is totally unregulated by ERISA with respect to welfare plans." *Ibid.*

In *National Bank of N.A. v. Intern. Broth., etc.* (1979) 419 N.Y.S.2d 127, 69 A.D.2d 679, appeal dismissed, 48

N.Y.2d 752, 422 N.Y.S.2d 666, 397 N.E.2d 1333, the court allowed a creditor to levy on or garnish a pension trust regulated by ERISA. The Trustees argued first that ERISA generally preempts all State statutes which affect the regulation of pension plans. The trustees next argued that the remedy of garnishment was expressly prohibited by ERISA section 206(d), 29 U.S.C. § 1056(d).

The court held that there was no absolute preemption of the State's procedures for enforcing money judgments. The court went on to explain that the state statute didn't relate to or interfere with the purposes of ERISA. The court found that the purposes of ERISA were to assure the equitable character and financial soundness of employee benefit plans and to protect the beneficiaries of the funds from mismanagement of those funds by the fiduciaries of the plans.

The New York court concluded its preemption discussion as follows:

> "A State statute will be pre-empted only when it tends to invade an aspect of the regulation of pension funds that is governed by ERISA as established in the Federal act. However, New York's vital interest in assuring the enforceability of our courts' judgments is wholly peripheral to the purposes of ERISA (citation). The state statute makes no attempt to regulate pension plans and presents no cognizable encroachment upon the exclusive province of ERISA regulation." (419 N.Y.S.2d at 130.)

VI.

OTHER COURTS HAVE FOUND AN EXCEPTION IN ERISA's PREEMPTION SECTION REGARDING THE AREA OF DOMESTIC RELATIONS.

The Ninth Circuit and the Second Circuit have held that a State's domestic relations laws are not preempted by ERISA and that former spouses could garnish ERISA-regulated *pension* trusts in order to collect child support and/or alimony obligations.

The Franchise Tax Board contends that a State's tax laws should be given the same respect as its domestic relations law and held not to be preempted by ERISA.

The Ninth Circuit in *Operating Engineers v. Zamborsky* (9th Cir. 1981) 650 F.2d 196 held that an ERISA regulated *pension* fund was subject to garnishment by an ex-spouse to satisfy alimony obligations. In coming to the above conclusion, the Ninth Circuit found that Congress did not intend to preempt the area of domestic relations and that the "police power of the States (would not) be superseded by (a federal law) unless that was the the clear and manifest purpose of Congress." (*Operating Engineers v. Zamborsky, supra*, 650 F.2d at 199, citing *Rice v. Santa Fe Elevator Corp.* (1947) 331 U.S. 218, 230.)

The Ninth Circuit in *Stone v. Stone* (9th Cir. 1980) 632 F.2d 740, cert. denied (1981) 453 U.S. 922 affirmed the District Court decision, *Stone v. Stone* (1978) 450 F.Supp. 919, which held that ERISA did not preempt a state court from ordering an ERISA-regulated *pension* plan to pay a plan participant's pension benefits directly to his or her ex-spouse.

In the District Court opinion, the court pointed out that "Section 514(a) was not, however, designed to preempt any state law with even the most tangential relation to ERISA." (*Stone v. Stone, supra*, 450 F.Supp. at 932.)

The Ninth Circuit in *Carpenters Pension Trust, Etc. v. Kronschnabel* (9th Cir. 1980) 632 F.2d 745, cert. denied (1981) 453 U.S. 922 (relying on the case of *In re Marriage of Campa* (1979) 89 Cal.App.3d 113, 152 Cal.Rptr. 362, appeal dismissed (1980), 444 U.S. 1028, held that ERISA does not preempt state court orders directing an ERISA-regulated pension plan to pay a community property share of a pension plan participant's monthly benefit payments directly to his or her ex-spouse.

The Second Circuit in *American Tel. and Tel. Co. v. Merry* (2nd Cir. 1979) 592 F.2d 118 held that an ex-spouse

could garnish ERISA-regulated *pension* benefits to satisfy alimony and support obligations. The Second Circuit stated that it would be unreasonable to conclude "that Congress intended to preempt even those state laws that only in the most remote and peripheral manner touch upon pension plans." *Id.* at p. 121.

The Board contends that the sovereign police power of a State to assess and collect taxes, especially from a *vacation* trust, is analogous to and just as important as the power of a State to control the area of domestic relations. Thus if the area of domestic relations is not preempted by ERISA, then the collection of taxes should not be preempted.

VII.

THE NINTH CIRCUIT HAS ERRONEOUSLY CONSTRUED ERISA IN A MANNER WHICH INTERFERES WITH THE SOVEREIGN RIGHT OF CALIFORNIA TO ASSESS AND COLLECT TAXES.

The power to tax is an incident of sovereignty and is co-extensive with sovereignty. *Harvester Co. v. Dept. of Taxation* (1944) 322 U.S. 435, 445; *Curry v. McCanless* (1938) 307 U.S. 357, 366; *McCullock v. Maryland*, 4 Wheat. 316, 429.

It follows that "A necessary incident of power to tax property is the power to uniformly enforce the collection of the tax by any constitutional means deemed appropriate to that end." *United States v. Hester* (10th Cir. 1943) 137 F.2d 145, 147-148.

The Board contends that the State of California has a vital interest in collecting taxes from taxpayers. This vital interest was recognized long ago by this Court in *Dows v. City of Chicago* (1870) 78 U.S. (11 Wall.) 108, where a National Bank tried to restrain the collection of a tax levied by the City of Chicago upon the bank's capital shares. This Court decided that no court could enjoin the collection of the tax, and stated as follows:

> "It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible." *Dows, supra*, 78 U.S. at 110.

ERISA section 514(a) may be unconstitutional if it interferes with the sovereign right of the State of California to uniformly collect taxes from all of its citizens. Thus, ERISA should be interpreted so that it does not interfere with this right. As this Court said in *International Association of Machinists, et al. v. Street* (1960) 367 U.S. 740, "Federal statutes are to be construed as to avoid serious doubt of their constitutionality." *Id.*, p. 749; *Accord, Lynch v. Overholser* (1961) 369 U.S. 705, 710-711. In *Fry v. United States* (1975) 421 U.S. 542, this Court stated as follows:

> "While the Tenth Amendment has been characterized as a 'truism,' stating merely that 'all is retained which has not been surrendered,' United States v. Darby, 312 U.S. 100, 124 (1941), it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." *Fry, supra*, 421 U.S. at 547 n.7.

In *National League of Cities v. Usery* (1976) 426 U.S. 833, this Court held that even the Commerce Clause did not give Congress the authority to intrude upon a State's performance of essential governmental functions. This Court said:

> "We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack affirmative grant of legislative authority to reach the matter, but because the

Constitution prohibits it from exercising the authority in that manner. *National League of Cities, supra*, 426 U.S. at 845.

The Franchise Tax Board respectfuly contends that the Ninth Circuit's interpretation of ERISA is incorrect in that Congress did not intend to preempt California's statute. Furthermore, ERISA should not be interpreted to interfere with the sovereign power of California to assess and collect its taxes.

Conclusion.

For the above stated reasons, the Franchise Tax Board respectfully submits that the court should note probable jurisdiction; (1) to clarify the meaning and effect of ERISA section 514(a) by construing it to not preempt the State of California from levying on ERISA covered vacation trusts; (2) to clarify the language in *Alessi* by stating that it does not apply to a State's levy on a vacation trust; (3) to declare that the United States District Court did not have subject matter jurisdiction of this action; (4) to declare that Congress did not intend to nor did it have the power to interfere with the sovereign power of the State of California to collect its taxes.

Respectfully submitted,

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Appendix A.

Opinion.

United States Court of Appeals for the Ninth Circuit.

Franchise Tax Board of the State of California, Appellee, v. Construction Laborers Vacation Trust for Southern California, Edward Ashton, Al Atwood, Gary Bronneck, John Clarke, R. C. Gallyon, Richard Greenberg, Roger Jaska, William Middleton, Louis Bravo, Benjamin T. James, George Mattocks, William R. McClain, Nick Orsura, Joe Rivera, Ray M. Wilson, and James Keyes, Appellants. No. 80-6080. DC No. 80-02741.

Filed: June 22, 1982.

Appeal from the United States District Court for the Central District of California. Manuel L. Real, District Judge, Presiding. Argued and submitted February 2, 1982.

Before: GOODWIN and TANG, Circuit Judges, and SOLOMON,* District Judge.

GOODWIN, J.

Three union members owe the State of California $48.70, $206.95 and $124.91 in unpaid personal income tax. The Franchise Tax Board of California levied against money held in trust for the three by the Construction Laborers' Vacation Trust Fund. When trustees for the fund refused to pay over the money owed, the state brought action for declaratory relief. The district court,[1] on cross motions for

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*The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

[1]If the case were a challenge to a tax, 28 U.S.C. § 1341 would preclude removal jurisdiction. But here the state is challenging a trust created under a federal statute. A fiduciary under 29 U.S.C. § 1002(14)(A) has been sued and moved to remove the case to the district court. The trust has raised a federal question under ERISA and 29 U.S.C. § 1132 makes the amount in controversary immaterial.

summary judgment, held that the vacation fund was not protected from the levy.

The Trust appeals on the ground that ERISA (Employment Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001;, *et seq.*) preempts California's attempt to levy on the vacation trust for unpaid taxes. The Trust relied on an ERISA Advisory Opinion from the Department of Labor. The state relies on the difference between vacation benefits and retirement benefits, and asserts that Congress intended to protect only the latter.

The facts are undisputed. Much of the law is likewise undisputed. When delinquent taxes are owed to the State of California, the state is authorized to issue a notice to withhold under California Revenue and Taxation Code, § 18817, which reads:

> "The Franchise Tax Board may be notice, served personally or by first class mail, require any employer, person, officer or department of the State, political subdivision or agency of the State . . . having in their possession, or under their control, any credits or other personal property or other things of value, belonging to a taxpayer or to an employer or person who has failed to withhold and transmit amounts due pursuant to Section 18815 or 18818, to withhold, from credits or other personal property or other things of value, the amount of any tax, interest, or penalties due from the taxpayer . . . and to transmit the amount withheld to the Franchise Tax Board at such time as it may designate."

ERISA specifies that its provisions "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ." 29 U.S.C. § 1144(a).An employee benefit plan is defined as a welfare plan or a pension plan. 29 U.S.C. § 1002(3). A welfare

benefit plan, in turn, is defined as a plan with "medical, surgical . . . accident, disability . . . or vacation benefits." 29 U.S.C. § 1002(1).

The Trust in the instant case is an employee benefit trust to which employer parties to collective bargaining agreements with the Southern California District Council of Laborers must contribute. Contributions are made for each hour worked or are otherwise paid pursuant to the bargaining agreement.

The Trust maintains a "vacation account" for each laborer and at a specific time gives him or her a check for his or her accumulated vacation benefits. The Trust is a spendthrift trust designed to insure that the beneficiaries do not dissipate the benefits. Article 9.08 of the Trust Agreement provides:

> "It is the intent and purpose of the Plan, and of this Agreement, and a material part of the consideration for the making of contributions to the Fund by individual employers, that the money in each vacation account shall be received by the employee entitled thereto personally. Accordingly, *no payments due the Fund and no monies in the vacation accounts established pursuant to the Plan shall be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge by any employee or other person and any such anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge shall be void and ineffective*. The money credited to the vacation account shall be subject to withdrawal and distribution only at the times, and in the manner and for the purposes specified in this Agreement." [Emphasis added.]

In a similar vein, § 4.06 of the Trust Agreement restrains the beneficiaries from alienating the accumulated money and specifies that the money "shall be exempt from the

claims of creditors or other claimants from all orders, decrees, garnishments, executions or other legal or equitable process or proceedings."

ERISA does not in so many words protect vacation trusts from creditors' claims, as it does protect pension plans. 29 U.S.C. § 1056(d)(1). Extending similar protection to vacation funds is consistent with the statute, however, if not demanded by it. Both types of ERISA plans have the same goal: to provide accumulated money to a worker for future beneficial use. The worker's money deserves trust protection from dissipation regardless of the purpose for which the money has been set aside under ERISA.

While the state has pointed out differences between pension funds which are conceded to be protected and vacation funds which the state seeks to reach for tax collection, the state has not identified a legal basis to warrant a retreat from preemption. Moreover, Congress has not left us at liberty to construe preemption as the state would have us construe it.

The same chapter of ERISA that describes the scope of protection of employee pension benefits provides for federal preemption in connection with welfare benefit plans. 29 U.S.C. § 1144(a). See *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981).

The vacation trust fund now before the court is obviously a benefit plan described in § 1002(1). Accordingly, under the teaching of the *Alessi* case, which had not been decided when this matter was before the district court, we have no choice but to reverse with directions to enter judgment for the appellants.

The judgment in favor of the state is vacated and the cause is remanded for the entry of a declaratory judgment

in favor of the appellants as prayed for in their cross-motion or summary judgment. Each party is to pay its own costs.

DISSENTING OPINION.

Franchise Tax Board v. Construction Laborers Vacation Trust, No. 80-6080.

Filed: June 22, 1982.

TANG, Circuit Judge dissenting:

I respectfully dissent. The majority opinion is flawed in two major respects. First, I doubt whether the district court possessed subject-matter jurisdiction over this action. Second, even if the district court possessed subject-matter jurisdiction, I disagree with the majority opinion's conclusion that ERISA preempts the California levying statute.

I. *The Absence of Subject-Matter Jurisdiction.*

It is axiomatic that an action brought in state court may be removed only if federal question, diversity, or some other independent federal jurisdictional basis exists. 28 U.S.C. § 1441(a) (1976); *Guinasso v. Pacific First Federal Savings & Loan Association*, 656 F.2d 1364, 1366 (9th Cir. 1981). It is likewise axiomatic that the jurisdictional basis for removal must be apparent from the plaintiff's complaint rather than from the defendant's answer or counterclaim. *See Gully v. First National Bank in Meridian*, 299 U.S. 109, 112-18 (1936).

The Franchise Tax Board's complaint does not provide these two fundamental basis for removal. Its prayer for relief is grounded purely upon state law and seeks recovery against only an in-state defendant. No federal question is raised,

nor does diversity of citizenship exist.[1] It is only the Trustees' defense that poses a federal question, namely, whether ERISA preempts the state levying statute. When raised as a defense, however, federal preemption is an insufficient jurisdictional basis for removal. *See, e.g., Guinasso*, 656 F.2d at 1366. The conclusion is inescapable that the district court lacked subject matter jurisdiction over this action to have permitted removal. *See Gully*, 299 U.S. at 112-18 (removal improper where plaintiff state tax collectors' cause of action based in state law and federal question presented only in defendant's answer). The district court judgment should therefore be vacated with instructions to remand the action to state court.

II. *Preemption by ERISA.*

The issue on the merits is whether ERISA preempts the California levying statute insofar as the state statute permits the Franchise Tax Board to levy against a vacation trust to

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[1]Admittedly, in determining the jurisdictional basis for removal, federal courts are not necessarily bound by how the plaintiff couches his claim. Sometimes federal law wholly displaces a plaintiff's state law remedies. In such cases, although a plaintiff purports to rely upon a state remedy, any right he possess is based in federal law, conferring federal question jurisdiction over his action. *See, e.g., Fristoe v. Reynolds Metal Co.*, 615 F.2d 1209, 1212 (9th Cir. 1980).

This basis for removal jurisdiction was applied in *Stone v. Stone*, 632 F.2d 740 (9th Cir. 1980), *cert. denied*, ___ U.S. ___, 101 St.Ct. 3158 (1981), to a state-based claim involving an ERISA issue. The plaintiff in *Stone* brought a state-created conversion action in state court against a pension plan, alleging that she owned a 40% community interest in the pension benefits of her divorced husband. Although her complaint based relief solely upon state law, the Ninth Circuit ruled that federal question jurisdiction supported removal because ERISA gave her standing as a plan "participant" to sue under ERISA § 502(a), 29 U.S.C. § 1132(a) (1976), to enforce a pension obligation. *Stone*, 632 F.2d at 743.

Stone, however, does not extend to this case. ERISA § 502(a) confers standing only to plan participants, beneficiaries, fiduciaries, and the Secretary of Labor. Unlike the disappointed spouse in *Stone*, the Franchise Tax Board does not fall into any of these categories. If it has a remedy, it is state-created and not based upon ERISA. The rationale supporting removal jurisdiction is therefore absent here.

satisfy a beneficiary's delinquent taxes. The majority opinion concludes that the levying statute is preempted. It finds first that the levying statute is in conflict with an implied requirement in ERISA prohibiting levies against vacation trust funds and, second, that the levying statute falls within the preemptive scope of ERISA § 514(a), 29 U.S.C. § 1144(a) (1976), as a State law relating to an employee benefit plan.[2] *Ante* at 3-4. Neither ground is persuasive.

A. *Direct Conflict with ERISA.*

It is clear that a state's levying statute is preempted if it directly conflicts with one of ERISA's regulatory provisions. *See, e.g., Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978). The majority opinion concedes that "ERISA does not in so many words protect vacation trusts from creditors' claims," *ante* at 3, but argues that ERISA's purpose and the anti-alienation clause in section 206(d)(1), 29 U.S.C. § 1056(d)(1) (1976)[3] supports finding an implied prohibition in ERISA against levying a vacation trust. *Ante* at 3.

The proposed opinion's reliance upon ERISA § 206(d)(1) is misplaced. Section 206(d)(1) explicitly states that it governs only *pension* funds. The plan here is a vacation trust fund, which fits within the definition of an "employee wel-

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[2]Section 514(a) provides:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

29 U.S.C. § 1144(a) (1976).

[3]Section 206(d)(1) provides in full:

> Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

29 U.S.C. § 1056(d)(1) (1976).

fare benefit plan." 29 U.S.C. § 1002(1). An "employee welfare benefit plan" in turn is strictly distinguished under ERISA from a "pension plan" and is excluded from the statutory part containing the anti-alienation provision. *See* 29 U.S.C. §1051(1).

Nor can an anti-alienation restriction be fairly implied from ERISA to apply to employee welfare benefit plans. First, the care Congress exercised in drafting section 206(d)(1) to exclude employee welfare benefit plans from that section's coverage should alone be sufficient to conclude that Congress did not mean to create an implied anti-alienation restriction. *See FTC v. Simplicity Pattern Co., Inc.*, 360 U.S. 55, 66-67 (1959). Second, no support can be found in ERISA's legislative history to suggest that Congress meant to immunize employee welfare benefit plans from garnishment, attachment or levy.

Third, ERISA's purposes do not mandate implying an anti-alienation restriction that is applicable to employee welfare benefit plans. The majority opinion argues that Congress was just as concerned with vacation funds as it was with pension funds. ERISA's regulatory structure suggests otherwise. ERISA heavily regulates pension funds. It imposes extensive reporting and disclosure requirements, minimum plan standards for participant eligibility and vesting, minimum funding standards, and standards of conduct for persons who serve in a fiduciary capacity to a plan. In contrast, the only statutory requirements imposed upon employee welfare benefit plans are the reporting and disclosure requirements of Part I and the fiduciary responsibility standards of Part IV. ERISA's limited regulation of welfare plans strongly suggests that Congress was more concerned with the possible dissipation of pension benefits than with the possible loss of employee welfare benefits. This difference in concern should not be surprising. In real world

terms, the loss of one's pension is far more catastrophic than the loss of funds devoted to financing an annual vacation.

Even if section 206(d)(1) applies to vacation trusts, either directly or by implication, it is doubtful whether section 206(d)(1) by its own force preempts state levying statutes. When Congress has intended to preempt state levy and attachment statutes, it has manifested its intent in explicit statutory language. *See, e.g.*, 38 U.S.C. § 3101(a) (veteran's benefits); 42 U.S.C. § 407 (Social Security Act); 45 U.S.C. § 231m (Railroad Retirement Act). *See also National Bank of North America v. International Brotherhood of Electrical Workers Local #3*, 419 N.Y.S. 2d 127, 131-32, 69 A.D.2d 679, ___, *appeal dismissed*, 48 N.Y.2d 752, 422 N.Y.S. 2d 666, 397 N.E. 2d 1333 (1979). Section 206(d)(1), however, makes no mention of either levy or attachment.

Moreover, to the extent that the section does impose a restriction, the Ninth Circuit decision in *Operating Engineers v. Zamborsky*, 650 F.2d 196, 201 (9th Cir. 1981), suggests that section 206(d)(1) governs merely the standards a plan must recite and does not limit a state's power to reach trust funds. While *Zamborsky* dealt only with garnishment statutes and not levying statutes, its rationale appears to compel the conclusion that section 206(d)(1) does not limit a state's traditional power to authorize a tax levy against a trust.

B. *Preemption by Section 514(a).*

Aside from relying upon section 206(d)(1), the majority opinion also argues that ERISA § 514(a) preempts the California levying statute. *Ante* at 3-4. Although the majority opinion's reasoning is not entirely clear, it apparently finds

dispositive the Supreme Court's recent decision in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 524 (1981).

Alessi, however, does not lend strong support for the proposed opinion's position. The key element in *Alessi*'s finding of federal preemption was the Court's conclusion that Congress had *expressly* intended to give pension administrators the option of offsetting pension benefits against workmen's compensation awards. *Id.* at 514-21, 524. The New Jersey statute under challenge there frustrated this Congressional command by prohibiting pension offsets. Given this direct conflict between federal and state legislative will, the Court acknowledged that it did not need to explore the outer limits of section 514(a)'s preemptive scope to hold the state statute preempted. *Id.* at 524. Indeed, given this direct conflict, it is likely that the state statute in *Alessi* would have been preempted even in the absence of section 514(a).

In contrast to the offset issue in *Alessi*, nothing in ERISA's statutory text or its legislative history reveals Congress' intention toward state levying statutes. The direct conflict between federal and state law that was present in *Alessi* is absent here. *Alessi* thus offers little guidance.

The absence of a direct conflict with one of ERISA's provisions does not necessarily mean that section 514(a) does not preempt the California levying statute. Section 514(a) states broadly that ERISA "supercede[s] . . . State laws insofar as they may *relate to* any employee benefit plan . . ." 29 U.S.C. § 1144(a) (emphasis added). This expansive language is refined by the section's definition of "State", which "includes a State, any political subdivision thereof, or any agency or instrumentality of either, which purports *to regulate, directly or indirectly*, the terms and conditions of employee benefit plans covered by this subchapter." 29 U.S.C. § 1144(c)(2) (emphasis added). This

choice of language indicates that Congress meant section 514(a) to have a far-reaching preemptive effect, superceding not only laws that directly regulate employee benefit plans, plan *qua* plan, but also laws that have a regulatory effect. *See generally Hewlett-Packard Co. v. Barnes*, 425 F. Supp. 1294, 1298-1300 (N.D. Cal. 1977) (detailing section 514's legislative history), *aff'd*, 571 F.2d 502 (9th Cir.), *cert. denied*, 439 U.S. 831 (1978).

Section 514(a)'s scope, however, is not unlimited. The legislative choice of the word "regulate" in section 514's definitions suggests that the section was not designed to preempt state laws having only a tangential, non-regulatory effect on benefit plans. Had that been the design, less restrictive words such as "affect", "influence", or "connected with" would have been employed, or benefit plan administrators would have been given blanket immunity from the application of state law. Thus, there exists a "narrow category of laws which *affect* employee benefit plans but which do not *relate* to them within the meaning of § 514(a)." *Stone v. Stone*, 450 F. Supp. 919, 932 (N.D. Cal. 1978) (emphasis added), *aff'd*, 632 F.2d 740 (9th Cir. 1980), *cert. denied*, ___ U.S. ___, 101 S.Ct. 3158 (1981). *See also Zamborsky*, 650 F.2d at 199-200.

In my opinion, the California levying statute falls within this narrow category of state laws. The state statute seeks only to secure payment of delinquent taxes and treats trust funds as merely another taxpayer asset the state may tap to achieve this aim. The statute does not regulate, directly or indirectly, plan reporting, disclosure, participation, funding, vesting, benefit calculation, or the trustees' fiduciary responsibilities.

The only "regulatory" effect the Trustees have identified is the administrative burden associated with processing levy notices. Similarly, the Department of Labor argues that tax

levy statutes are preempted because of the administrative burden entailed in litigating a levy's validity. *See* ERISA Opinion Letter 79-90A, [1979-1981 Transfer Binder] Pens. Plan Guide (CCH) ¶ 25,331. This effect is simply too minor to be considered "regulatory." If administrative inconvenience is alone sufficient to invoke section 514's preemptive operation, state income taxation of trust assets would also be preempted under the statute because preparing state tax forms is time-consuming and might involve litigation. Acceptance of the administrative inconvenience rationale would also require overruling prior Ninth Circuit precedent permitting attachment of pension fund benefits to satisfy marital support obligations because attachment also requires substantial administrative processing and might involve litigation. *See id.* at 199-200; *Carpenters's Pension Trust v. Kronschnobel*, 632 F.2d 745 (9th Cir. 1980), *cert. denied*, ___ U.S. ___, 101 S.Ct. 3158 (1981); *Stone*, 632 F.2d at 742.

It is also doubtful whether the state statute imposes a serious administrative burden on the Trustees. Employee benefit plans are currently subject to *federal* tax levies. *See* 26 C.F.R. § 1.401(a)-13(b)(2). Processing state tax levies should be no more exotic or burdensome.

Interpreting section 514(a) to preempt the California levying statute also raises grave constitutional difficulty. A state's taxing power is one of its attributes of sovereignty, existing independent of the Constitution and reserved under the Tenth Amendment except as conditioned by other provisions of the Constitution. *See Railroad Co. v. Peniston*, 85 U.S. (18 Wall.) 5, 29 (1873). A necessary incident of this power is the power to enforce uniformly the collection of a tax. *See United States v. Hester*, 137 F.2d 145, 147-48 (10th Cir. 1943). A finding of federal preemption here will pose a serious obstacle to the state's exercise of this

power, casting doubt on section 514(a)'s constitutionality. The constitutional difficulty this construction creates provides an additional reason for construing section 514(a) not to preempt the California levying statute. *See Lynch v. Overholser*, 369 U.S. 705, 710-11 (1962) (federal statutes are to be construed to avoid serious doubt of constitutionality); *International Association of Machinists v. Street*, 367 U.S. 740, 749 (1961) (same).

Assuming the district court possessed subject-matter jurisdiction, I would affirm the district court's judgment.

Appendix B.

Judgment.

United States District Court, Central District of California.

Franchise Tax Board of the State of California, Plaintiff, v. Construction Laborers Vacation Trust for Southern California, Edward Ashton, Al Atwood, Gary Bronneck, John Clarke, R. C. Gallyon, Richard Greenberg, Roger Jaska, William Middleton, Louie Bravo, Benjamin T. James, George Mattocks, William R. McClain, Nick Orsura, Joe Rivera, Ray M. Wilson, James Keyes, as Trustees, and on behalf of Construction Does I to XXX, inclusive, Defendants. Case No. 80-02741-R.

Filed: December 3, 1980.

Cross-motions for summary judgment came on for hearing before this Court on October 20, 1980, the Honorable Manuel L. Real presiding. Patti S. Kitching, Deputy Attorney General, appeared on behalf of the plaintiff and James P. Watson of Cox, Castle and Nicholson, appeared on behalf of the defendant. The Court examined the exhibits submitted in support of and in opposition to said motions, reviewed the Memoranda of Points and Authorities, and the matter was argued and submitted.

The Court being fully advised herein and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Plaintiff Franchise Tax Board's motion for summary judgment is granted.

2. Defendant Construction Laborers Vacation Trust for Southern California (hereinafter defendant Trust Fund) wrongfully failed and refused to honor the levies of the Franchise Tax Board upon defendant Trust Fund

in collection of the tax indebtedness of beneficiaries Jesse Murphy, Eriberto Salcedo and Vincent Zarate.

3. The Franchise Tax Board has been damaged as a direct and proximate result of defendant Trust Fund's wrongful failure and refusal to honor the Franchise Tax Board's levy and garnishment.

4. The Franchise Tax Board is awarded judgment against defendant in the amount of $395.49 as of November 5, 1980, with interest of $0.083 per day accruing as of November 6, 1980.

5. Defendant is legally obligated to honor all future levies by the Franchise Tax Board upon defendant Trust Fund in collection of tax delinquencies of the beneficiaries of defendant Trust Fund.

DATED: December 3, 1980.

[Stamp] Manuel L. Real

MANUEL L. REAL

United States District Judge

Appendix C.

Findings of Fact and Conclusions of Law.

United States District Court, Central District of California.

Franchise Tax Board of the State of California, Plaintiff, v. Construction Laborers Vacation Trust for Southern California, Edward Ashton, Al Atwood, Gary Bronneck, John Clarke, R. C. Gallyon, Richard Greenberg, Roger Jaska, William Middleton, Louie Bravo, Benjamin T. James, George Mattocks, William R. McClain, Nick Orsura, Joe Rivera, Ray M. Wilson, James Keyes, as Trustees and on behalf of Construction Does I to XXX, Inclusive, Defendants. Case No. 80-02741-R.

Filed: December 3, 1980.

The Franchise Tax Board of the State of California (the Board) filed a complaint for failure to honor garnishment and for declaratory relief in the Superior Court of the State of California for the County of Los Angeles. The Construction Laborers Vacation Trust for Southern California (the Trust) and the trustees thereof removed the suit to Federal Court and filed a motion to dismiss. The Board's motion to remand was denied by this court. The parties stipulated that this court could treat the motion to dismiss as if cross-motions for summary judgment had been filed by the parties and that no triable issues of fact remain in this case.

The cross-motions for summary judgment came on for hearing before the Honorable Manuel L. Real, United States District Judge, on October 20, 1980.

Based upon the papers filed by the parties, the pleadings and the oral argument advanced at the time of the hearing, the court makes the following findings of fact and conclusions of law.

I

FINDINGS OF FACT

1. The parties have stipulated that there are no facts in dispute.

2. The Board is the duly constituted agency of the State of California charged with the enforcement of the Personal Income Tax Law of the State of California and is authorized pursuant to California Revenue and Taxation Code section 18817 to issue notices to withhold to enforce collection of unpaid tax liabilities.

3. Construction Laborers Vacation Trust for Southern California is, and was at all times mentioned herein, an express trust established on April 14, 1966, by written agreement and declaration of trust.

4. The Southern California District Council of Laborers and various employers' associations entered into a collective bargaining agreement which provides for the establishment of a fund for the payment of paid vacations. (Trust Agreement, Article II.)

5. The trust was established to receive contributions and to provide vacation benefits for eligible employees. (Trust Agreement, Article II.)

6. The Construction Laborers Vacation Trust for Southern California is an "employee welfare benefit plan" as defined by 29 USC § 1002(1) and an "employee benefit plan" as defined by 29 USC § 1002(3). It is not an "employee pension benefit plan" as defined by 29 USC § 1002(2).

7. Contributions to the fund are a part of the wages due to the employees covered by the collective bargaining agreement and are subject to withholding tax and social security and unemployment taxes. (Trust Agreement, Article IX.)

8. Under the collective bargaining agreement, employers are obligated to pay to the Trust a fixed sum per hour

for each hour worked on behalf of each employee whose work is covered by the collective bargaining agreement. (Trust Agreement, Article VI.)

9. The Trust accumulates the contributions in a "vacation account" for each covered employee. The Trust issues a check annually for the vacation benefits to each covered employee who meets certain requirements set forth in the Trust Agreement. (Trust Agreement, Article IX.)

10. Jesse Murphy, while a resident of the State of California during the tax year ending December 1976, incurred personal income tax liability to the State of California, and $48.70 plus accruing interest remains due and owing.

11. Eriberto G. Salcedo, while a resident of the State of California during the tax years ending December 1975 and December 1976, incurred personal income tax liability to the State of California, and $206.95 plus accruing interest remains due and owing.

12. Vincent Zarate, while a resident of the State of California during the tax year ending December 1977, incurred personal income tax liability to the State of California, and $124.91 plus accruing interest remains due and owing.

13. On or about September 20, 1978 and/or April 20, 1978, the Board issued a notice to withhold to the Trust pursuant to California Revenue and Taxation Code section 18817. Said notice to withhold enumerated the tax indebtedness of Murphy, Salcedo and Zarate and directed that, pursuant to California Revenue and Taxation Code section 18817, the Trust withhold and transmit to the Board any credits or other personal property or other things of value in the Trust's possession or under their control belonging to Murphy, Salcedo and/or Zarate up to the total amount of tax indebtedness of each of said individuals.

14. On or about January 7, 1980, the Trust notified the Board that it would not honor the notices to withhold pursuant to an advisory opinion from the United States Department of Labor.

15. At the time of the service of the notices to withhold, there existed in the Trust Fund monetary accruals in favor of Murphy, Salcedo and Zarate which the Trust wrongfully failed and refused to pay over to the Board pursuant to said notices to withhold.

16. By reason of the aforesaid failure and refusal of the Trust, the Board has been damaged in a sum equal to the then existing accruals in favor of Murphy, Salcedo and Zarate not to exceed $380.56 plus interest from June 1, 1980.

II
CONCLUSIONS OF LAW

1. There was at the time of the service of the notices to withhold and there continues to be an actual controversy between the parties concerning their respective legal rights and duties.

2. The Trust and the trustees wrongfully failed and refused to honor the levies of the Board upon the Trust in collection of the tax indebtedness of Murphy, Salcedo and Zarate.

3. The Trust and the trustees are obliged and required by law to pay over to the Board all amounts held in the Construction Laborers Vacation Trust for Southern California in favor of Murphy, Salcedo and Zarate sufficient to satisfy the indebtedness of each of said individuals.

4. The Board has been damaged as a direct and proximate result of the Trust's wrongful failure and refusal to honor the Board's levy and garnishment, and the amount of said damage is equal to the accruals existing in favor of

Murphy, Salcedo and Zarate at the time of said levy plus interest.

5. The Trust is legally obligated to honor all future levies by the Board upon the Trust in collection of tax delinquencies of the beneficiaries of the Trust.

6. Sections 18817 and 18818 of the California Revenue and Taxation Code do not conflict with the Employment Retirement Income Security Act of 1974 (ERISA), 29 USC § 1001, et. seq.

7. Sections 18817 and 18818 of the California Revenue and Taxation Code have not been preempted by ERISA.

8. Revenue and Taxation Code sections 18817 and 18818 do not directly or indirectly regulate employee benefit plans and are wholly peripheral to the purposes of ERISA.

9. ERISA itself does not prohibit the Board from levying on the vacation trust fund benefits at issue in this case.

10. The so-called "spendthrift trust" provisions of the subject Trust are not applicable to the Board and the Trust is not immune from the Board's levy.

11. The purposes of ERISA were to assure the equitable character and financial soundness of employee benefit plans and to protect the beneficiaries of the funds from mismanagement of those funds by the fiduciaries of the plans. ERISA protects interstate commerce and the interests of employees and beneficiaries by requiring disclosure and reporting to participants and beneficiaries of financial and other information and by requiring standards of conduct, responsibility and obligation for fiduciaries and by providing remedies, sanctions and access to the Federal Courts.

12. The only anti-alienation provision of ERISA is contained at section 206(d)(1) of ERISA, 29 USC § 1056(d)(1) and applies only to pension plans. It does not apply to

employee welfare benefit plans as defined by 29 USC § 1002(1).

13. On December 28, 1979, the U.S. Department of Labor issued an advisory opinion pursuant to ERISA Procedure 76-1. The opinion quoted portions of ERISA sections 403(c)(1) [29 USC § 1103(c)(1)], 404(a)(1) [29 USC § 1104(a)(1)], and 514 [29 USC § 1144(a)]. Relying on these statutory provisions, the Department of Labor's advisory opinion stated in part:

> "It is the position of the Department of Labor that the process of any state judicial or administrative agency seeking to levy for unpaid taxes or unpaid unemployment insurance contributions upon benefits due a participant or beneficiary under the Plan is preempted under ERISA § 514."

14. The advisory opinion did not distinguish between "employee welfare benefit plans" as defined by 29 USC § 1002(1) and "employee pension benefit plans" as defined by 29 USC § 1002(2).

15. This advisory opinion is clearly erroneous, unreasonable, arbitrary and capricious.

16. This advisory opinion exceeds the scope of ERISA, is not reasonably necessary to effectuate the purpose of ERISA and is inconsistent with the Congressional policy underlying ERISA.

17. Judgment shall be entered in favor of plaintiff, Franchise Tax Board of the State of California, in accordance with the above findings of fact and conclusions of law.

18. This Court has jurisdiction over the subject matter of the within action, and personal jurisdiction over the parties hereto.

19. To the extent any findings of fact set forth above may be deemed to contain a conclusion of law, it is incor-

porated in these conclusions of law. To the extent that these conclusions of law contain any finding of fact, each finding is incorporated in the findings of fact set forth above.

DATED: December 3, 1980.

[Stamp] Manuel L. Real
MANUEL L. REAL
United States District Judge

Appendix D.

Order.

United States Court of Appeals for the Ninth Circuit.

Franchise Tax Board of the State of California, Appellee, v. Construction Laborers Vacation Trust for Southern California, et al., Appellant. No. 80-6080. DC No. 80-2741.

Filed: July 21, 1982.

Before: GOODWIN and TANG, Circuit Judges, and SOLOMON,* District Judge.

Appellee's petition for rehearing is denied.

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*The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

Appendix E.

Petition for Rehearing.

In the United States Court of Appeals for the Ninth Circuit.

Construction Laborers Vacation Trust for Southern California, Edward Ashton, Al Atwood, Gary Bronnock, John R. Clarke, R.C. Gallyon, Richard Greenberg, Roger Jaska, William Middleton, George Mattocks, William R. McClain, Nick Orsura, Joe Rivera, Ray M. Wilson, and James Keyes, Appellants, v. Franchise Tax Board of the State of California, Appellee. No. 80-6080.

Filed: July 6, 1982.

Appellee, the Franchise Tax Board of the State of California (hereinafter the Board) petitions for a rehearing to reconsider the judgment entered in this action on June 22, 1982.

This petition is based on the following grounds:

1. In the opinion of counsel, the court has overlooked that fact that the Franchise Tax Board originally brought an action in the state court entitled Complaint for Failure to Honor Garnishment and for Declaratory Relief. The opinion as prepared by this Honorable Court states only that the Franchise Tax Board brought an action for declaratory relief and does not mention that the complaint included a cause of action for failure to honor garnishment.

2. In the opinion of counsel, the majority opinion has overlooked the issue of whether the federal court has jurisdiction of this matter. The issue was not previously raised in this appeal although it was raised by the Board before the district court in a Motion to Remand. The district court denied the Board's Motion to Remand but granted the Board's Motion for Summary Judgment. Thus far, the briefs filed by the parties on

appeal have focused solely on the merits of the case and have not focused on the question of jurisdiction. The purpose of this Petition for Rehearing is to renew the Board's argument that the federal court lacks subject matter jurisdiction over this action.

INTRODUCTION

The Franchise Tax Board's Complaint for Failure to Honor Garnishment and for Declaratory Relief was originally filed in the state court on June 13, 1980. (Docket Item 1, Exh. A, Excerpt of Record, pp. 1-9.) Both causes of action alleged by the Board were based on state law.

On June 25, 1980, appellants, the Trustees of the Construction Laborers Vacation Trust for Southern California (hereinafter Trustees) filed a Petition for Removal (Docket Item 1). They alleged that the federal court had original jurisdiction over this proceeding pursuant to sections 403(c)(1) and 514 of the Employee Retirement Income Security Act of 1974 (hereinafter ERISA). (29 U.S.C. §§ 1103, 1104, 1144.) The Trustees alleged that the action was properly removed to federal court pursuant to 28 U.S.C. § 1441.

On or about September 18, 1980, the Board filed a Motion to Remand pursuant to 28 U.S.C. § 1447(c) on the grounds that the above-entitled action did not involve a claim or right arising under the Constitution, treaties or laws of the United States, nor was there any other basis for federal court jurisdiction over the above-entitled action, since the Board's cause of action against the Trustees arose solely under state law, namely the California Revenue and Taxation Code as construed and applied by the courts of the State of California.

On or about September 26, 1980, the Trustees filed opposition to the Motion to Remand and on or about October

1, 1980, the Board filed a reply memorandum in support of its Motion to Remand. On October 6, 1980, the court denied the Board's Motion to Remand.

ARGUMENT

I

THE FEDERAL COURT DOES NOT HAVE JURISDICTION OVER THE INSTANT PROCEEDING

The Board's causes of action for failure to honor garnishment and for declaratory relief are based solely on state law. Federal law was raised merely as a *defense* to the Board's causes of action.

The Board has the right to sue defendant Trustees for failure to honor garnishment pursuant to California Revenue and Taxation Code sections 18817 and 18818.

Revenue and Taxation Code section 18817 states in relevant part:

> "The Franchise Tax Board may . . . require any employer, person, . . . having in their possession, or under their control, any credits or other personal property or other things of value, belonging to a taxpayer . . . to withhold, from such credits or other personal property or other things of value, the amount of any tax, interest, or penalties due from the taxpayer . . . and to transmit the amount withheld to the Franchise Tax Board at such times as it may designate."

Revenue and Taxation Code section 18818 states:

> "Any employer or person failing to withhold the amount due from any taxpayer and to transmit the same to the Franchise Tax Board after service of a notice pursuant to Section 18817 is liable for such amounts."

The Board has the right to sue defendant Trustees for declaratory relief pursuant to California Code of Civil Procedure section 1060.

In the instant case, there is no way to construe the Board's cause of action as arising under federal law because ERISA does not provide for the Board to bring any kind of lawsuit.

ERISA section 502 (29 U.S.C. § 1132) provides specifically who is empowered to bring a civil suit.

29 U.S.C. § 1132 provides as follows:

"(a) A civil action may be brought —

(1) by a participant or beneficiary —

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (1) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section."

The Board is not a participant, beneficiary, the Secretary of Labor or a fiduciary and could not bring a Complaint for

Failure to Honor Garnishment and for Declaratory Relief under the provisions of ERISA.

The Trustees cited 28 U.S.C. § 1441 as their authority to remove the instant case to the federal court. 28 U.S.C. § 1441 has several subsections. 28 U.S.C. § 1441(a) and 1441(b) both require that the district court must have original jurisdiction of the civil action which is to be removed.

The Trustees alleged in their petition for removal that the subject action involved an employee benefit plan and thus the federal court had original jurisdiction over this action under sections 403(c)(1) and 514 of ERISA.

Section 403(c)(1) of ERISA (29 U.S.C. § 1103(c)(1) states in pertinent part:

> ". . . [T]he assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan."

Section 514 of ERISA (29 U.S.C. § 1144) states in pertinent part:

> ". . . [T]he provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975."

The Trustees also appeared to rely on the provisions of section 404 of ERISA (29 U.S.C. § 1104) which pertain to fiduciary duties.

It is the position of the Board that 29 U.S.C. §§ 1103(c)(1), 1104 and 1144 are merely alleged defenses to the Board's causes of actions and thus cannot establish subject matter jurisdiction for a federal court.

II

FEDERAL SUBJECT MATTER JURISDICTION MUST BE ESTABLISHED SOLELY BY THE COMPLAINT AND THE FEDERAL COURT MAY NOT LOOK TO THE FEDERAL DEFENSE AVERRED IN AN ANSWER TO ESTABLISH SUBJECT MATTER JURISDICTION

This case should not have been removed to the federal court because the Board relied solely on state law for its causes of action. Federal law was raised as a *defense* to the Board's action.

As this Court said in *Guinasso v. Pacific First Fed. Sav. & Loan Ass'n.* (9th Cir. 1981) 656 F.2d 1364, 1365:

> "A suit can be removed to federal court under 28 U.S.C. § 1441(a) only if it could have been brought there originally. Snow v. Ford Motor Co., 561 F.2d 787, 789 (9th Cir. 1977). . . ."

This Court further stated in *Guinasso*:

> "A substantial proposition of federal law must form 'a direct and essential element of the plaintiff's cause of action.' Smith v. Grimm, 534 F.2d 1346, 1350 (9th Cir.) cert. denied, 429 U.S. 980, 97 S.Ct. 493, 50 L.Ed.2d 589 (1976). . . ." 656 F.2d at 1366.

It is clear that federal jurisdiction must be established solely by the complaint. (*Skelly Oil Co. v. Phillips Petroleum* (1950) 339 U.S. 667, 673-674; *Gully v. First National Bank* (1936) 299 U.S. 109, 113; *Tennessee v. Union & Planters' Bank* (1894) 152 U.S. 454, 459; *La Chemise LaCoste v. Alligator Co., Inc.* (3rd Cir. 1974) 506 F.2d 339, 343-344, cert. den. 421 U.S. 937 rehg. den. 421 U.S. 1006; *Wong v. Bacon* (N.D. Cal. 1977) 445 F.Supp. 1177, 1182.)

The federal claim must not be asserted by way of defense. (*Gully v. First National Bank, supra*, 299 U.S. 109, 113; *Self v. General Motors Corp.* (9th Cir. 1978) 558 F.2d 655, 657; *La Chemise LaCoste v. Alligator Co., Inc., supra*, 506 F.2d 339, 343-344, cert den. 421 U.S. 937, rehg. den. 421 U.S. 1006; *People of the State of California v. General Motors Corp.* (9th Cir. 1970) 431 F.2d 732, 733; *Farmco Stores, Inc. v. Newmark* (D.C. Cal. 1970) 315 F.Supp. 396, 397-398.)

The Board has not asserted any federal subject matter jurisdiction in its Complaint. Thus, the federal court does not have subject matter jurisdiction of the instant case merely because the Trustees relied on the provisions of ERISA for their defense.

In their previously filed opposition to the Board's Motion to Remand, the Trustees argued that the Board had raised the issue of whether ERISA preempts state law adequately in its complaint.

In reality, the Board referred to the ERISA issue by anticipating the Trustees' *defense*. The Board's cause of action was based solely on state law.

The United States Supreme Court has repeatedly and clearly held that in order for a claim to rise "under the Constitution, laws, or treaties of the United States," a right or immunity created by the Constitution or laws of the United States must be an essential element of the plaintiff's cause of action. (*Phillips Petroleum Co. v. Texaco Co.* (1974) 415 U.S. 125, 126; *Gully v. First Nat. Bank* (1936) 299 U.S. 109, 112.)

The Supreme Court has also pointed out that the federal question must be disclosed upon the face of the complaint, unaided by the answer and the complaint itself will not serve as a basis of jurisdiction insofar as it goes beyond a statement

of the plaintiff's cause of action and anticipates or replies to a probable defense. (*Phillips Petroleum Co. v. Texaco Co., supra*, at 127-128; *Gully v. First Nat. Bank, supra*, at 113.)

The *Gully* case concerned an action by the State Collector of Taxes against a national bank as agent for its shareholders. The Supreme Court took the case to consider the jurisdiction of the District Court and decided that the District Court did not have jurisdiction. The court said:

> "Not every question of federal law emerging in a suit is proof that a federal law is the basis of the suit. The tax here in controversy if valid as a tax at all, was imposed under the authority of a statute of Mississippi. The federal law did not attempt to impose it or to confer upon the tax collector authority to sue for it." (299 U.S. at 115.)

The New York District Court case of *Nat. Bank of N. America v. Loc. 553 Pension Fund, etc.* (E.D. N.Y. 1978) 463 F.Supp. 636, is very similar to the instant case. In that case, the provisions of ERISA were raised as a defense by the Trustees to an action of a judgment creditor for a pension beneficiary to garnish a portion of the beneficiary's monthly pension benefits. The case was filed in state court and removed to federal court. The District Court granted the motion to remand. The court stated that the "[R]esolution of this motion turns on whether the claim sued upon arises under federal law." (463 F.Supp. at 638.)

The Trustees argued that the case arose under federal law pursuant to ERISA section 502(a)(1)(B). (29 U.S.C. § 1132(a)(1)(B)). The court stated the arguments as follows:

> "To span the apparent gulf between the kind of action contemplated by Section 502(a)(1)(B) and the relief sought by the Bank in this proceeding — garnishment of a portion of Lombardo's monthly pension

benefits — as well as the fact that the Bank, as judgment creditor, hardly qualifies as a 'participant' or 'beneficiary' as those terms are defined in ERISA, see 29 U.S.C. § 1002(7) & (8), . . . the fund offers a two-pronged argument. First, it contends that the order petitioner seeks would necessarily modify Lombardo's right to receive benefits from the Fund and that the proceeding must, therefore, be viewed as one brought 'to clarify the rights of a pensioner to future benefits.' . . . Second, the Fund invokes the familiar rule that a judgment creditor 'stands in the shoes' of the judgment debtor when he seeks to enforce the judgment against property of the judgment debtor held by a third party. . . . Petitioner responds that it does not seek to clarify Lombardo's right to pension benefits but simply to 'intercept' a portion of the benefits currently being paid to him, in order to satisfy the 1975 Civil Court judgment." (463 F.Supp. at 638-639.)

The court rejected the Trustees' argument and stated:

"It is evident here that the Bank's claim, as reflected in its petition to the State court, derives entirely from State, rather than federal, law. Indeed, the relief sought — an order directing the Fund to pay to the Bank a portion of Lombardo's monthly pension benefits — is purely a creation of New York law. See N.Y. CPLR § 5225(b). The Fund's effort to characterize the proceeding as an action brought to clarify a pensioner's right to future benefits from a plan subject to ERISA's substantive provisions — and therefore both within this court's subject matter jurisdiction and calling for a federally-created remedy — is foreclosed by the simple fact that the Bank is neither a 'participant' nor a 'beneficiary,' and in any event falls within the Fund's concession of its obligation, under the terms of the plan, to Lombardo. Certainly, the Bank's claim presupposes Lombardo's right to receive pension benefit

payments; but the Bank's right, if any, to reach those payments stems entirely from the judgment-enforcing remedies provided by the CPLR, and not from the common law notion that a judgment creditor's interest in property held by a third party is coextensive with that of his judgment debtor. [Citations.]" (463 F.Supp. at 639.)

The court concluded by stating:

"Even if the matters raised in defense by the Fund required interpretation of federal law,[4] it is settled that '[a] defense based on federal law . . . will not sustain removal jurisdiction.' "

In a footnote to the decision the court discussed at length the interpretation of federal law question. The court said:

"4. Of course, the fact that federal law may govern certain aspects of a case does not mean that the action arises under federal law for purposes of original or removal jurisdiction. Again, the remedy sought by petitioner is not one provided by Section 502 nor is the proceeding one over which Congress has given the federal courts jurisdiction. The Supreme Court has uniformly rejected the view that federal jurisdiction may be asserted over an action solely on the ground that a property right or interest recognized or governed by federal law is involved or may be affected by the action where, although matters of national policy are implicated, neither the federal government nor a federal entity is a party and no proprietory interest of the federal government is in issue or is likely to be affected by the outcome. Thus where, as here, a claim is founded on State law and does not lie within any specific grant of federal court subject matter jurisdiction, it must be prosecuted in the State courts, and will be governed by State substantive law except to the extent that federal question may emerge in determining the contours of the State claim." (463 F.Supp. at 641.)

The Ninth Circuit case of *People of the State of California v. General Motors Corporation*, 431 F.2d 732 (9th Cir. 1970) held that "a case arises under the law of the United States only if a right created by federal law is an essential element of plaintiff's case." (431 F.2d at 733; accord, *Smith v. Grim*, 534 F.2d 1346 (9th Cir. 1976).) The *General Motors* case noted that there was "no conclusionary language in the complaint alleging that any of plaintiff's federal rights have been violated." (431 F.2d at 733.)

In the instant case, the Board has not alleged that any of its federal rights have been violated and no right created by federal law is an essential element of the Board's case.

III

ALLEGED PREEMPTION IS NOT A BASIS FOR JURISDICTION

The Trustees have previously alleged preemption as a basis for this Court's jurisdiction. However, this argument has been specifically rejected by this Court. In *Guinasso v. Pacific First Fed. Sav. & Loan Ass'n* (9th Cir. 1981) 656 F.2d 1364, 1366, this Court said:

> "Federal preemption is ordinarily a matter to be raised in defense. See Gully v. First Nat'l Bank, 299 U.S. 109, 116, 57 S.Ct. 96, 99, 81 L.Ed. 70 (1936). Taken alone, it is not a basis for removal. Washington v. American League of Professional Baseball Clubs, 460 F.2d 654, 660 (9th Cir. 1972)."

CONCLUSION

For the above stated reasons, the Board respectfully submits that a Petition For Rehearing should be granted and then this case should be remanded to the district court with instructions to remand the action to state court.

DATED: July 2, 1982.

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Appendix F.

Notice of Appeal to the Supreme Court of the United States. (Supreme Court Rule 10).

United States Court of Appeals for the Ninth Circuit.

Franchise Tax Board of the State of California, Plaintiff, v. Construction Laborers Vacation Trust for Southern California, et al., Defendants. No. 80-6080. DC No. 80-02741-R.

Filed: September 17, 1982.

NOTICE IS HEREBY given that the California Franchise Tax Board, the plaintiff above named, hereby appeals to the Supreme Court of the United States from the final judgment ("opinion") of the United States Court of Appeals, Ninth Circuit, entered in this action on June 22, 1982, (Petition for Rehearing filed July 6, 1982, was denied by the Court of Appeals by "Order" filed July 21, 1982) reversing the judgment of the United States District Court for the Central District of California entered December 4, 1980 in Case Number 80-02741-R.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

DATED: September 16, 1982.

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Appendix G.

California Revenue and Taxation Code.

§ 18817.

§ 18817. Franchise Tax Board's notice to withhold and transmit credits, etc., belonging to taxpayer, employer, etc.

The Franchise Tax Board may by notice, served personally or by first-class mail, require any employer, person, officer or department of the state, political subdivision or agency of the state, including the Regents of the University of California, a city organized under a freeholders' charter, or a political body not a subdivision or agency of the state, having in their possession, or under their control, any credits or other personal property or other things of value, belonging to a taxpayer or to an employer or person who has failed to withhold and transmit amounts due pursuant to Section 18815 or 18818, to withhold, from such credits or other personal property or other things of value, the amount of any tax, interest, or penalties due from the taxpayer or the amount of any liability incurred by such employer or person for failure to withhold and transmit amounts due from a taxpayer under this part and to transmit the amount withheld to the Franchise Tax Board at such times as it may designate.

Amended Stats 1978 ch 711 § 3.

Appendix H.

California Revenue and Taxation Code.

§ 18818.

§ 18818. Liability for failing to withhold pursuant to notice

Any employer or person failing to withhold the amount due from any taxpayer and to transmit the same to the Franchise Tax Board after service of a notice pursuant to Section 18817 is liable for such amounts.

Appendix I.

ERISA § 2.

29 U.S.C. § 1001.

TITLE I—PROTECTION OF EMPLOYEE BENEFIT RIGHTS

SUBTITLE A—GENERAL PROVISIONS

FINDINGS AND DECLARATION OF POLICY

Sec. 2. (a) The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interest commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees

with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) It is hereby further declared to be the policy of this Act to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

Appendix J.

ERISA § 3(1).

29 U.S.C. § 1002(1).

DEFINITIONS

Sec. 3. For purposes of this title:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947[1] (other than pensions on retirement or death, and insurance to provide such pensions).

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[1] 29 U.S.C.A. § 186(c).

Appendix K.

ERISA § 3(2).

29 U.S.C. § 1002(2).

(2) The terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—

(A) provides retirement income to employees, or

(B) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,

regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

Appendix L.

ERISA § 3(3).

29 U.S.C. § 1002(3).

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

Appendix M.

ERISA § 4(a).

29 U.S.C. § 1003(a).

COVERAGE

Sec. 4. (a) Except as provided in subsection (b) and in sections 201, 301, and 401, this title shall apply to any employee benefit plan if it is established or maintained—

(1) by any employer engaged in commerce or in any industry or activity affecting commerce; or

(2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or

(3) by both.

Appendix N.

ERISA § 101(a).

29 U.S.C. § 1021(a).

SUBTITLE B—REGULATORY PROVISIONS

Part I—Reporting and Disclosure

DUTY OF DISCLOSURE AND REPORTING

Sec. 101. (a) The administrator of each employee benefit plan shall cause to be furnished in accordance with section 104(b) to each participant covered under the plan and to each beneficiary who is receiving benefits under the plan—

(1) a summary plan description described in section 102(a)(1); and

(2) the information described in section 104(b)(3) and 105(a) and (c).

Appendix O.

ERISA § 101(b).

29 U.S.C. § 1021(b).

(b) The administrator shall, in accordance with section 104(a), file with the Secretary—

(1) the summary plan description described in section 102(a)(1);

(2) a plan description containing the matter required in section 102(b);

(3) modifications and changes referred to in section 102(a)(2);

(4) the annual report containing the information required by section 103; and

(5) terminal and supplementary reports as required by subsection (c) of this section.

Appendix P.

ERISA § 201(1).

29 U.S.C. § 1051(1).

Part 2—Participation and Vesting

COVERAGE

Sec. 201. This part shall apply to any employee benefit plan described in section 4(a) (and not exempted under section 4(b)) other than—

(1) an employee welfare benefit plan;

Appendix Q.

ERISA § 206(d)(1).

29 U.S.C. § 1056(d)(1).

(d)(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

Appendix R.

ERISA § 301(a)(1).

29 U.S.C. 1081(a)(1).

PART 3 — FUNDING
COVERAGE

Sec. 301. (a) This part shall apply to any employee pension benefit plan described in section 4(a), (and not exempted under section 4(b)), other than —

(1) an employee welfare benefit plan;

Appendix S.

ERISA § 302(a)(1).

29 U.S.C. § 1082(a)(1).

MINIMUM FUNDING STANDARDS

Sec. 302. (a)(1) Every employee pension benefit plan subject to this part shall satisfy the minimum funding standard (or the alternative minimum funding standard under section 305) for any plan year to which this part applies. A plan to which this part applies shall have satisfied the minimum funding standard for such plan for a plan year if as of the end of such plan year the plan does not have an accumulated funding deficiency.

Appendix T.

ERISA § 401(a).

29 U.S.C. § 1101(a).

PART 4 — FIDUCIARY RESPONSIBILITY

COVERAGE

Sec. 401. (a) This part shall apply to any employee benefit plan described in section 4(a) (and not exempted under section 4(b)), other than —

Appendix U.

ERISA § 403(c)(1).

29 U.S.C. 1103(c)(1).

(c)(1) Except as provided in paragraph (2) or (3) or subsection (d), or under sections 4042 and 4044 (relating to termination of insured plans), the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

Appendix V.

ERISA § 404(a)(1)(A).

29 U.S.C. § 1104(a)(1)(A).

FIDUCIARY DUTIES

Sec. 404. (a)(1) Subject to sections 403(c) and (d), 4042, and 4044, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and —

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

Appendix W.

ERISA § 501.

29 U.S.C. § 1131.

PART 5—ADMINISTRATION AND ENFORCEMENT

CRIMINAL PENALTIES

Sec. 501. Any person who willfully violates any provision of part 1 of this subtitle, or any regulation or order issued under any such provision, shall upon conviction be fined not more than $5,000 or imprisoned not more than one year, or both; except that in the case of such violation by a person not an individual, the fine imposed upon such person shall be a fine not exceeding $100,000.

Appendix X.

ERISA § 514(a).

29 U.S.C. § 1144(a).

EFFECT ON OTHER LAWS

Sec. 514. (a) Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b). This section shall take effect on January 1, 1975.

Appendix Y.

ERISA § 514(c)(2).
29 U.S.C. § 1144(c)(2).

EFFECT ON OTHER LAWS

(c) For purposes of this section:

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, *which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title.*